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The Right of Privacy at Common Law

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NOTE AND COMMENT.

THE RIGHT OF PRIVACY AT COMMON LAW.—It is quite evident that the question as to whether there is a right of privacy at common law must be met by the courts in most of our states in the not distant future, unless indeed the right is created or declared by the legislatures. The latter course has been followed in the state of New York, whose legislature in 1903 passed an act "to prevent the unauthorized use of the name or picture of any person for the purposes of trade." (Chapter 132 of the Laws of New York of 1903, page 308.) This act makes persons offending against it, guilty of misdemeanor, and liable, in civil actions, in damages, to persons injured by such violations of the statute. The Court of Appeals of New York in 1908, in the case of *Rhodes v. Sperry & Hutchinson Co.*, 193 N. Y. 223, 85 N. E. 1097, declared that this statute violated neither the federal nor the state constitution. The same court in 1902, in *Roberson v. Rochester, etc., Co.*, 171 N. Y. 539, 64 N. E. 442, by a vote of four to three, had held that the right of privacy did not exist at common law in the state of New York. The act referred to was passed at the very next session, perhaps, upon the suggestion to that end made by PARKER, C. J., in the opinion of the majority of the court in the *Roberson* case, *supra*, certainly in response to a growing demand for a greater regard for the

decencies of life. This *Roberson* case was the first in which any court of last resort had been compelled to squarely decide whether or not the common law recognizes a right of privacy. It is unfortunate that the one additional vote needed to make into a majority of the court, the minority which, in an able dissenting opinion, declared for the existence of the right, was not forthcoming. The history of this question from the time when it was first placed prominently before the country in 1890, by Messrs. S. D. Warren and L. D. Brandeis in an article in 4 HARV. L. REV. 193, down to 1905, when the case of *Pavesich v. N. E. Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, was decided, has already been traced in this REVIEW, Vol. 3, p. 559. In that case the Supreme Court of Georgia held unanimously that the right does exist at common law.

Thus the matter rested, so far as courts of last resort are concerned, until last summer, when two other state courts of final appeal passed upon the question. In *Henry v. Cherry & Webb* (1909), — R. I. —, 73 Atl. 97, upon facts not unlike those in the *Pavesich* case, supra, in an unanimous opinion, the existence of such a right at common law was denied. The conclusion was based mainly upon the grounds that until the *Pavesich* case was decided, the right had never been admitted by a court of authority, that while something like the right of privacy, the "right to be let alone," had been judicially asserted in many cases, it had always been in connection with a right of property, or in cases in which slander or libel were the gist of the action, and that no property question is involved in this alleged right. It is an elaborately argued and very able opinion, following the brief for the defendants somewhat closely, but it is narrow and technical and certainly does not present that view of the elasticity and adaptability of the common law of which we are so fond of boasting.

In *Foster-Milburn Co. v. Chinn* (1909), — Ky. —, 120 S. W. 364, Chinn brought action against the Foster Co., which manufactured a patent medicine, for printing in its advertising matter, his picture and a copy of a spurious letter purporting to have been signed by him recommending the medicine. The opinion in the case contains references to this publication as libellous, but the decision is clearly based not upon the theory of libel, but of an invasion of the right of privacy. The court says (120 S. W. 366) "While there is some conflict in the authorities, we concur with those holding that a person is entitled to the right of privacy as to his picture, and that the publication of the picture without his consent * * * is a violation of the right of privacy, and entitles him to recover *without proof of special damages*;" citing the *Pavesich* case, supra.

It may well be doubted whether legislative declaration and definition of this right will prove as satisfactory, especially under rapidly changing conditions, as will the judicial recognition of the right. The narrowness and rigidity of the New York statute are apparent.

H. M. B.

LIMITATION OF A CARRIER'S LIABILITY FOR NEGLIGENCE.—This is one of the subjects which never seems to be set at rest. In making contracts, shipper and carrier do not stand upon an equality. The shipper cannot exist without the